No. 5480

United States Circuit Court of Appeals

For the Ninth Circuit.

LUTHER WEEDIN, United States Commissioner of Immigration, District No. 28,
Appellant,

vs.

ERICH PAUL HANS HEMPEL,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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NAMES AND ADDRESSES OF COUNSEL.

THOS. P. REVELLE, Esquire, Attorney for Appellant,
310 Federal Building, Seattle, Washington.

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315 Federal Building, Seattle, Washington.

Messrs. PATTERSON & ROSS, Attorneys for Appellee,
806 Dexter Horton Building, Seattle, Washington. [1*]

In the United States District Court for the Western District of Washington, Northern Division.

No. 12,043.

ERICH PAUL HANS HEMPEL,

Petitioner,

vs.

LUTHER WEEDIN, United States Commissioner of Immigration District No. 28,

Respondent.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the petitioner by his attorneys, Patterson & Ross, and complains of the respondent and for cause of action alleges:

I.

That petitioner is a resident of the city of Seattle, King County, Washington.

II.

That the respondent is the United States Commissioner of Immigration for District No. 28, with headquarters at Seattle, Washington.

III.

That on the 15th day of April, 1927, a warrant of arrest was issued for petitioner, an alien, charging that he was found in the United States in violation of the Immigration Act of February 5, 1917, for the following reasons:

1. That he was a person likely to become a public charge at the time of his entry.

2. That he has been convicted of or admits the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to his entry to the United States. [2]

That a hearing was had and the testimony of the alien, and the alien alone, was taken and reduced to writing. That the original record thereof is now in Washington, D. C., in the office of the Honorable Secretary of Labor, and the copies thereof are in the possession of and under the control of the Im-

migration Officers of the United States and are not available to your petitioner.

IV.

That the board of inquiry before which said hearing was had found that the charges contained in the warrant were sustained and certified the record of said hearing to the Honorable Secretary of Labor and recommended that said alien, your petitioner, be deported.

V.

That thereafter your petitioner appealed from the finding of the said Board of Inquiry to the Honorable Secretary of Labor and that the Honorable Secretary of Labor has found upon consideration of aforesaid record that the said alien, your petitioner, is in the United States in violation of law, that he was a person likely to become a public charge at the time of his entry; and that he has been convicted of or admits the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to his entry into the United States, and the Honorable Secretary of Labor has issued his warrant directing the deportation of your petitioner. That the Immigration Officers refuse to give a copy thereof to your petitioner.

VI.

That the respondent now has your petitioner in custody by virtue of said warrant and by virtue of said warrant threatens to remove your petitioner

from this district on the 23d day of [3] November, 1927, in execution thereof.

VII.

That as and for the reason hereinbefore set forth your petitioner is unable to set forth a copy of the record of the testimony taken and received before the Board of Inquiry with reference to the charges above mentioned against your petitioner and therefore alleges that the following is the substance of all of said testimony:

(a) There was no evidence adduced to sustain the first charge; that on the contrary an affirmative showing was made by your petitioner to the following effect: The alien reached the United States on the 16th day of November, 1923; that he immediately came to Seattle where he has resided ever since. The testimony shows he had $50.00 in cash when he reached this country and his father had executed a guaranty that he would not become a public charge. He went immediately to Seattle, and promptly entered the business college for the purpose of learning the English language and to take up bookkeeping. He remained with the college about one year. He then went to the Y. M. C. A. College for nine months and from there he went to the University of Washington. At the Y. M. C. A. he studied English, French and algebra, and at the University of Washington took up a course in pharmacy, where he remained for two quarters, and then having been married he went to work as clerk in a hotel where he was employed

for three months. Shortly after quitting that job he accepted a position with the Pacific Westbound Conference where he worked two months. From that position he went to work in the office of the Eagles Lodge of Seattle, where he is now employed. All this time he was a man in perfect health, and the above is all of the evidence adduced on said charge.

(b) The evidence bearing on the second charge was [4] as follows: That in 1920 he was convicted of theft, he received a sentence of two years, but at the end of eighteen months was pardoned and then made full restitution. He then secured work and had no further trouble in his country. That he continued employed thereafter until he left Germany for the United States, a period of about sixteen months. That in May, 1923, your petitioner applied to the American Consul-General at Berlin for a visé of petitioner's passport and at said time made a full disclosure of the record of conviction against your petitioner as above mentioned. That thereupon the American Consul-General informed your petitioner that it would be necessary for the latter to furnish documentary evidence concerning the disposition of your petitioner's case. That thereafter your petitioner renewed his application and submitted with his renewed application documentary evidence of the pardon that had been granted him as the final disposition of said case. That upon said documentary evidence being presented to said American Consul-General and upon investigation made by said American Consul-Gen-

eral, your petitioner's passport was viséed and he was placed in the quota for emigration to the United States. And your petitioner then came to the United States and was admitted by the United States Immigration Authorities at New York.

That in addition to the testimony of your petitioner he offered in evidence certificates of good character and industry covering the period of his residence in the United States, and evidence of his declaration to become a citizen of the United States. [5]

VIII.

That on said hearing your petitioner was unable to produce documentary proof of the aforesaid pardon, but stated to said Board of Inquiry that if given time could procure the same. That your petitioner now has in his possession the said documentary evidence of said pardon in the form of a certificate from the Justice Head Secretary of the Land Court at Frankfort-on-Oder, the officer having custody of said record. That your petitioner has on the 31st day of October, 1927, requested of the Secretary of Labor of the United States, a rehearing for the purpose of producing said proof of pardon, and said petition for rehearing has been denied.

IX.

That by reason of the matters and things herein alleged your petitioner is entitled to remain in the United States; that he has not been accorded a fair hearing and that the evidence adduced at said hear-

ing was not sufficient upon which to base an order and warrant of deportation.

That your petitioner is illegally restrained of his liberty and therefore prays:

An order of this Court directing the Clerk to issue out of and under the seal of this Court a writ of habeas corpus directed to Luther Weedin, United States Commissioner of Immigration of District No. 28, commanding him to have the body of your petitioner before this Court at a time and place to be fixed therefor, and then and there show cause, if any he have, why your petitioner should be further restrained of his liberty, and to receive such further orders as the Court may make in the premises.

PATTERSON & ROSS,
Attorneys for Petitioner.

806 Dexter Horton Building, Seattle, Washington.
[6]

State of Washington,
County of King,—ss.

Erich Paul Hans Hempel, being first duly sworn, on his oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof and that the same is true.

ERICH PAUL HANS HEMPEL.

Subscribed and sworn to before me this 22 day of November, 1927.

[Seal] BERT C. ROSS,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed Nov. 23, 1928. [7]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

The above-entitled matter coming on for hearing this 22 day of November, 1927, upon the petition of Erich Paul Hans Hempel, for a writ of habeas corpus, and upon statement by counsel, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that Luther Weedin, United States Commissioner of Immigration of District No. 28, be and he is hereby required to be and appear in the above-entitled court at ten o'clock in the forenoon, Saturday, November 26th, 1927, in the city of Seattle, King County, or as soon thereafter as convenient for the Court, to then and there show cause, if any there be, why a writ of habeas corpus should not issue in the said matter as prayed for in the petition herein filed, and why the petitioner should not be discharged from custody.

This order and the petition on which it is based to be served on the respondent Luther Weedin, United States Commissioner of Immigration, by

this day delivering to him or one of his assistants a copy of the order and petition, the petitioner to forthwith deposit with the Clerk of this court $50.00 to defray any additional expense incurred in the detention of petitioner by respondent pending the final determination of this matter.

Done in the chambers of this court at Tacoma, this 22d day of November, 1927, at Tacoma, Wash.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Nov. 23, 1927. [8]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington:

Comes now the respondent, Luther Weedin, United States Commissioner of Immigration at Seattle, Washington (District No. 28), and, for answer and return to the order to show cause entered herein, certifies that the said Erich Paul Hans Hempel was duly arrested by an immigrant inspector under authority of a warrant of arrest issued by the Secretary of Labor April 15, 1927, charging that the said Erich Paul Hans Hempel had been found in the United States in violation of the Immigration Act of February 5, 1917, for the following among other reasons: That he was

a person likely to become a public charge at the time of his entry; and that he had been convicted of or admitted the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to entry into the United States; that the said Erich Paul Hans Hempel was thereafter accorded a hearing before an immigrant inspector, at which time *had* was afforded an opportunity to show cause why he should not be deported; that, as a result of said hearing, a deportation warrant was issued by the Secretary of Labor July 7, 1927, commanding that the said Erich Paul Hans Hempel, who landed at the port of New York, N. Y., ex *XX* "President Roosevelt" on the 16th day of November, 1923, be returned to Germany—the country whence he came—for the reasons set forth above contained in the warrant of arrest; that the said Erich Paul Hans Hempel was at liberty under bond of $1,000 from April 16, 1927, until November 22, 1927; that, since the latter date respondent has held, and now holds and detains, the said Erich Paul Hans Hempel for deportation from the United States as an alien person not entitled to be and remain in the United States [9] under the laws of the United States, and subject to deportation under laws of the United States.

The original record of the Department of Labor in the deportation proceedings against Erich Paul Hans Hempel is hereto attached and made a part and parcel of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, Luther Weedin, United States Commissioner of Immigration at Seattle, Washington (District No. 28), who makes this return, prays that the petition for a writ of habeas corpus be denied.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at Seattle, Washington (District No. 28), and the respondent named in the foregoing return; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 2d day of December, 1927.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Endorsed]: Received a copy of the within ——— this 5 day of Dec., 1927.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 5, 1927. [10]

[Title of Court and Cause.]

MEMORANDUM DECISION.

After Hearing, on Petition for Writ of Habeas Corpus.

Filed January 23, 1928.

PATTERSON & ROSS, Seattle, for Petitioner.

THOS. P. REVELLE, U. S. Attorney, and ANTHONY SAVAGE, Asst. U. S. Attorney, Seattle, for Respondent.

CUSHMAN (D. J.).—In April, 1927, petitioner was, upon a warrant of the Assistant Secretary of Labor, arrested, the charge being that he was found in the United States in violation of the Immigration Act of February 5, 1917. In May, after a hearing conducted by an Immigrant Inspector in which the only testimony taken was that of the petitioner, his deportation was recommended. In June a board of review made the following recommendation:

> " * * * This alien, male, aged 37, married, native and citizen of Germany, of the German race, arrived at New York November 16, 1923, ex SS. 'President Roosevelt' and was admitted on primary inspection. He has been released on bond. Alien was granted a hearing at Seattle, Washington, May 4, 1927, by Immigrant Inspector Joseph H. Gee.
>
> This case came to the attention of the Immigration Service through information by a representative of the staff of the German Consul

General at Seattle who reports that alien had been convicted of embezzlement in Germany. Alien admits that he was convicted for misappropriating money but he claims that he restored all money he took and was pardoned after serving eighteen months. He also claims that he told the American Consul in Berlin of his conviction and pardon prior to the issuance of his visa. Even though the alien's statement that he has been pardoned be true, yet under the decision of the court in the case of [11] United States ex rel. Palermo vs. Smith, 17 Fed. (2d) 534, the alien is subject to deportation. In the case cited the Circuit Court of Appeals held that that part of Section 19 of the Immigration Act of 1917 exempting from deportation those aliens who had been convicted of crimes involving moral turpitude and were later pardoned only applied to aliens who had been convicted in this country and pardoned. In view of this fact, and the admission of the alien that he has been convicted abroad, deportation appears mandatory.

Considered and recommended that alien be deported to Germany at the expense of the Steamship Company, on the grounds:

That he is in the U. S. in violation of the Act of February 5, 1917, in that he has been convicted of or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to entry into the

> United States, to wit: theft; and that he was a person likely to become a public charge."

Upon the foregoing report petitioner's deportation was ordered by the Assistant to the Secretary. A rehearing was asked by the petitioner to introduce documentary evidence of his pardon of the offense committed by him in Germany, which rehearing was denied, and the petitioner is held for deportation. Upon the return of the order to show cause why a writ of habeas corpus should not issue discharging petitioner, a certificate showing full pardon of such offense was introduced. The fact of such pardon has not been questioned. The sole question for decision, is as to the effect of the pardon. This is shown by the recommendation of the board of review. Sec. 4289¼jj, provides for the deportation of:

> " * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * ."

The second proviso of Sec. 19 of the Immigration Act of February 5, 1917, 39 Stat. at large, Chap. 29, pp. 874, [12] 889, 890, Comp. Stat., Supp. 1919, Sec. 4289¼jj, provides:

> " * * * Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act."

Respondent's contention is:

> " * * * The entire context of the second proviso shows plainly that it relates solely to aliens convicted of crimes committed after entry into the United States, and has no application to the 10th clause of the section. In this connection attention is invited to the opinion of the Circuit Court of Appeals for the Second Circuit, in the case of United States ex rel. Palermo vs. Smith, decided February 7, 1927. (17 Fed. (2d) 534.)"

Petitioner cites: Mast vs. Stover etc., 44 L. Ed. 856, at 858; 20 R. C. L. 556; Ex parte Garland, 18 L. Ed. 366; Young vs. United States, 24 L. Ed.

" * * * The Constitution provides that the President 'shall have power to grant reprieves and pardons for offences against the United States, except in case of impeachment.' The power thus conferred is unlimited, with the exception stated. It extends to every offence known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction [14] and judgment. * * *

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in con-

sequence of the conviction and judgment.
* * *

> The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the Act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one stated."

In Burdick vs. United States, 236 U. S. 79, it was held that the acceptance of a pardon was essential to its validity, but it has been held this is not true in all cases. Biddle vs. Perovich, decided by the Supreme Court May 31, 1927. In the latter case it was said:

"A pardon in our days is not a private act of grace from an individual happening to

possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that THE PUBLIC WELFARE will be better served by inflicting less than what the judgment fixed. See Ex parte Grossman, 267 U. S. 87, 120, 121. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the PUBLIC WELFARE, not his consent determines what shall be done. So far as a pardon legitimately cuts down a penalty it AFFECTS the JUDGMANT imposing [15] it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required."

(Italics those of this Court.)

In Ex parte Grossman, 267 U. S. 87, in holding that the President may pardon a criminal contempt, it is said:

" * * * The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. Ex parte Garland, 4 Wall. 333, 380. * * *

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. * * * "

In Knote vs. United States, 95 U. S. 149, at 153 and 154, it was said:

> "The effect of a pardon upon the condition and rights of its recipient have been the subject of frequent consideration by this court; and principles have been settled which will solve the question presented for our determination in the case at bar. Ex parte Garland, 4 Wall. 333; Armstrong's Foundry, 6 id. 766; United States vs. Padleford, 9 id. 531; United States vs. Klein, 13 id. 128; Armstrong vs. United States, id. 155; Pargoud vs. United States, id. 156; Carlisle vs. United States, 16 id. 147; Osborn vs. United States, 91 U. S. 474.
>
> A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practical and within control of the pardoning power,

been suggested. 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, EXECUTIVE or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. * * * "

(Italics those of this Court.)

In the present case the Court's attention has [17] not been directed to any treaty provision touching this identical question, or text writer discussing it.

In Bank of Augusta vs. Earle, 13 Peters, 519 at 589, the Court said:

" * * * The comity thus extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said in Story's Conflict of Laws, 37, that 'IN THE SILENCE OF ANY POSI-

TIVE RULE, AFFIRMING OR DENYING, OR RESTRAINING THE OPERATION OF FOREIGN LAWS, COURTS OF JUSTICE PRESUME THE TACIT ADOPTION OF THEM BY THEIR OWN GOVERNMENT, UNLESS THEY ARE REPUGNANT TO ITS POLICY, OR PREJUDICIAL TO ITS INTERESTS. It is not the comity of the courts, but ascertained in the same way, and guided by the same reasoning by which all other principles of municipal laws are ascertained and guided.' "

(Italics those of this Court.)

In Hilton vs. Guyot, *supra,* page 166, the following from Wheaton is quoted with approval:

> " * * * 'All the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. The express consent of a State, to the application of foreigners within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and ADMINISTRATIVE AUTHORITIES, as well as by the writings of its publicists' * * * ."

(Italics those of this Court.)

At page 167, it is said:

> "A judgment affecting the status of persons, such as a decree dissolving a marriage,

is recognized as valid in every country, unless contrary to the policy of its own law. Cottington's Case, 2 Swanston, 326; Roach vs. Garvin, 1 Ves. Sen. 157; Harvey vs. Farnie, 8 App. Cas. 43; Cheely vs. Clayton, 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in Cottington's case, above cited, said: 'It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they can be reversed by law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, [18] if they should serve us so abroad, and give no credit to our sentences.' "

At page 214, it is said:

"Mr. Justice Cooley said: 'True comity is equality; we should demand nothing more, and concede nothing less.' McEwan vs. Zimmer, 38 Mich. 765, 769."

After a review of the laws and decisions of various countries of the two Americas, of Europe and those of Egypt, it was said by the Court, at page 227:

"It appears, therefore, that there is hardly a civilized nation on either continent, which,

by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States—Norway, Portugal, Greece, Monaca, and Hayti—the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being PRIMA FACIE evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain—as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgment of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in Sec. 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence. The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive

> effect when sued upon in this country, but are PRIMA FACIE evidence only of the justice of plaintiff's claim."

The decision in this case was rendered in 1895. It will be seen from the foregoing decision that as to judgments, a different rule prevails in France than in Germany. In Hilton vs. Guyot, *supra,* the effect to be given to a judgment recovered in France, in a suit between private parties, was the matter being considered by the Court.

Speaking of the German rule, the Court said: [19]

> Page 219, "In the Empire of Germany, as formerly in the States which now form part of that Empire, the judgment of those States are mutually executed; and the principle of reciprocity prevails as to the judgments of other countries, * * *
>
> By the German Code of 1887, 'compulsory execution of the judgment of a foreign court cannot take place, unless its admissibility has been declared by a judgment of exequater'; 'The judgment of exequater is to be rendered without examining whether the decision is conformable to law'; but it is not to be granted if reciprocity is not guaranteed.' * * *
>
> The Reichsgericht, or Imperial Court, in a case reported in full in Piggott, has held that an English judgment cannot be executed in Germany, because, the court said, the German courts, by the Code, when they execute foreign judgments at all, are 'bound to the unqualified

> recognition of the legal validity of the judgments of foreign courts,' and 'it is, therefore, an essential requirement of reciprocity, that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts, which are to be enforced by its courts; and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of *thie* execution, by the court EX OFFICIO, nor be allowed by the admission of pleas which might lead to it.' * * * "

As already pointed out, the Court in considering the scope and application of the rule or practice as to comity of nations, makes no distinction between judgments rendered by the courts of other nations, and the executive acts and administrative decrees of the authorities of such nations, pages 164 and 165; while a pardon is an executive act, it affects the judgment and the sentence; for, as stated in Ex parte Garland, *supra,* the pardon reaches "both the punishment prescribed for the offense, and the guilt of the offender."

In Second Russian Ins. Co. vs. Miller, 268 U. S. 552, at 560, a Russian ukase was being considered, and while it was denied effect in the particular case, the decision in no way limits any of the foregoing decisions. The reason for denying effect to it is stated as follows:

" * * * Certainly such an application of foreign [20] law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined, the more so as the contract between a Russian and a German which we are asked to hold illegal on the basis of Russian law is shown by the expert testimony in the case to be valid according to the German law. The contention runs counter to the reasoning of such cases, * * * ."

Among the authorities cited by the Court in support of its ruling were included the case of Bank of Augusta vs. Earle and Hilton vs. Guyot, *supra.* See, also, the following: Gioe vs. Westervelt et al., 116 Fed. 1017; Strauss vs. Conried, 121 Fed. 199; Campagnie Du Port De Rio Janeiro vs. Mead, etc., 19 Fed. (2d) 163.

In Carlesi vs. New York, 233 U. S. 51, the question was as to the effect of a pardon by the President, where the defendant in a State court had been convicted and sentenced as for a second offense, despite the pardon. The question was, whether the State statute imposed an additional punishment for a crime of which defendant had been convicted, and pardoned. The Supreme Court considered itself bound by the construction of the State statute, that it did not, and held that the pardon did not prevent the application of the State statute in the case of a second offense.

The second proviso of Sec. 19 to the effect that the provision respecting deportation should not apply to one who had been pardoned, it has been contended that it having been held that this provision was limited to pardoned offenders committing crimes after entry into the United States, that therefore an intent is shown by the proviso to exclude and deport those convicted prior to entry of offenses involving moral turpitude, whether pardoned or not. It is no doubt true that one of the surest ways of indicating the scope and meaning of a statute [21] is by exception or proviso—that is, by taking out of an enactment what otherwise would have been included. But this rule of construction presupposes the effectiveness of the exception or proviso. If in fact this proviso saved from deportation an alien convict, pardoned by the President, then it might plausibly be argued that an intent was shown to deport a foreign convict, in spite of his pardon.

As above pointed out, it was held in Ex parte Garland that Congress can neither limit the effect of a Presidential pardon, "nor exclude from its exercise any class of offenders." It must therefore be concluded that this proviso was the result of pains taken by Congress to show that there was no intent to interfere in any way with the Presidential pardon prerogative to fully pardon, rather than the assumption of power on the part of Congress to deport a pardoned convict, that is a power asserted by disclaiming a present purpose to exercise it. The taking of such care manifests no in-

tent to deny effect to the pardon of a foreign Executive. The statute is, therefore, to be construed unaffected by this proviso. It subjects to deportation: "any alien who was convicted of or admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude."

The reference to the admission of the commission of a crime contemplates an admission where there has been no conviction. The right of pardoning is coextensive with the right of punishment. If, upon a review by an appellate court, petitioner's conviction had been reversed, no one would contend that it was the conviction meant by the statute, although it would fall within the letter of the Act.

A pardon avoids a sentence, sometimes [22] because of mistakes at the trial, and sometimes because of reasons that a Court cannot entertain.

In a decision in 1908, Gesellchaft vs. Umbreit, 208 U. S. 570, the Supreme Court assumed the following from the Prussian treaty of 1828, to be in effect between the United States and Germany:

> " * * * 'There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and pro-

tection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances prevailing.' "

After his pardon, petitioner had the same right, so far as the laws of his country were concerned, as any other of its citizens. The treaty with Prussia was made before the Empire, and the above decision was rendered before the World War and the Republic's succession to the Empire. The Court knows of no writing elsewhere evidencing the right of our nationals to enter and sojourn in Prussia than this treaty, which, as modified by our immigration laws, regulates the right of German citizens of Prussia to enter and sojourn in the United States.

After the war of 1812, in considering the effect that that war had upon the treaty with Great Britain made at the close of the Revolution, it was said by the Supreme Court, in Society of the Propagation of the Gospel vs. New Haven, 8 Wheaton, 464, at 494:

> " * * * But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto,* by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace.
>
> Whatever may be the latitude of doctrine laid down by elementary writers of the law of nations, dealing in general terms, in relation to [23] this subject, we are satisfied, that the

doctrine contended for is not *is not* universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our indipendence, would be gone, and we would have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace. * * * ”

While the treaty of 1828 did not deal with the case of war, and while it did not profess to aim at perpetuity, it did authorize the doing of acts that were bound to result in enduring interests and relations. The petitioner, since residing in the United States, has married and at the time of his

arrest was living with his wife in Seattle. A statute and a treaty should, if possible, be construed so that both can stand together, and be given effect. United States vs. Mrs. Gue Lim, 178 U. S. 459; Chew Heong vs. United States, 112 U. S. 536; Cheung Sum Shee vs. Nagle, 268 U. S. 336. See, also, Powers vs. Comly, 101 U. S. 789, and in the matter of Lum Poi and NG Shee, Case No. 12058 of the causes in this court, a decision rendered January 12th, 1928.

The Court, in Hilton vs. Guyot, *supra,* points out a recognition accorded by Germany to foreign judgments, greater than that in certain other countries. The American Consul at Berlin, who viséed petitioner's passport, was obviously in a better position to know the extent to which the German Government would reciprocate in such a [24] matter, than was the Board of Review, and the province of determining such a question pertains nearer to the office of the Consul than that of the Board.

A reason that may have induced Congress not to define the effect of a foreign pardon is: There are foreign nations whose Governments, laws and civilization are similar to our own, and there are others which are not. There are countries that, though their governments and civilization may be similar to ours, differ in matters of policy as to the recognition of acts by the authorities of other nations, analagous to those here in question. Some of these differences are pointed out above in quotations from the opinion in Hilton vs. Guyot. The principle of reciprocity in such matters is adopted

and approved by the Supreme Court in that case,—such matters are a part of international law which it is the province of the courts to determine.

Sec. 19 of the Immigration Act does not subject to deportation a German citizen of Prussia, convicted of a crime involving moral turpitude, in Prussia, and fully pardoned before entering the United States; as it appears probable that a like comity would be shown by Germany in the case of our nationals found in that country.

As the record now stands, the petitioner should be discharged from custody.

The order will be settled upon notice.

[Endorsed]: Filed Jan. 23, 1926. [25]

[Title of Court and Cause.]

ORDER GRANTING WRIT OF HABEAS CORPUS.

This matter having come on regularly to be heard on the 19th day of December, 1927, on the petition of Erich Paul Hans Hempel for a writ of habeas corpus and the order to show cause issued thereon; the return of Luther Weedin, United States Commissioner of Immigration, District No. 28, thereto, and the demurrer of the petitioner to said return, and the Court having considered said petition, order to show cause, return thereto and the demurrer to said return, and having heard the testimony of the witnesses produced on behalf of the petitioner,

and having considered other proof offered on behalf of said petitioner, and being fully advised in the premises, and the Court having heretofore filed its written opinion herein,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED, that the writ of habeas corpus prayed for in the petitioner's petition be granted, and that the petitioner be discharged from custody, upon filing bond provided for in the attached order this day made.

Done in open court this 24th day of January, 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Jan. 24, 1928, 2:10 P. M. [26]

ORDER RELEASING PETITIONER ON BAIL.

The respondent having given notice in open court of an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the foregoing order, it is further

ORDERED, ADJUDGED AND DECREED that during the pendency of the appeal in the above-entitled matter the petitioner be enlarged on bail in the sum of One Thousand and no/100 Dollars ($1,000.00).

Done in open court this 24th day of January, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed Jan. 24, 1928, 2:10 P. M.

[Endorsed]: Filed Jan. 25, 1928, 9:15 A. M. [27]

[Title of Court and Cause.]

ORDER FIXING BOND.

This matter having come on this date to be heard on the oral motion of counsel for the petitioner for reduction of bail as heretofore fixed by this Court in the sum of $1,000.00 pending the appeal of the respondent to the United States Circuit Court of Appeals for the Ninth Circuit, and the Court having considered the affidavit of the petitioner, Erich Paul Hans Hempel, filed in support of said motion, in which the said Erich Paul Hans Hempel tendered one certain United States Liberty Bond, third series, in the sum of $500.00, the same being No. 537,911 in lieu of the bail heretofore fixed by this Court, and the Court being fully advised in the premises,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the bail of the petitioner, pending the appeal in the above-entitled action as heretofore fixed by this Court, be and the same is hereby reduced to the sum of $500.00.

AND IT IS FURTHER ORDERED, that the Liberty Bond hereinabove mentioned in the sum of $500.00 be accepted by the Clerk of this court in lieu of cash bond.

Done in open court this 26th day of January, 1928.

EDWARD E. CUSHMAN.

O. K.—ANTHONY SAVAGE,

Asst. U. S. Atty.

Jan. 26, 1928.

[Endorsed]: Filed Jan. 26, 1928. [28]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Erich Paul Hans Hempel, Appellee, and Patterson & Ross, Attorneys for Said Appellee.

You and each of you will please take notice that Luther Weedin, United States Commissioner of Immigration, District No. 28, respondent in above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above-entitled cause on the 24th day of January, 1928, and that the certified transcript of record will be fixed in the said Appellate Court within thirty days from the filing of this notice.

THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Respondent.

Due service and receipt of a copy hereof is admitted this 19 day of March, 1928.

PATTERSON & ROSS,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 19, 1928. [29]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding and deciding that a writ of habeas corpus be awarded to the petitioner herein.

II.

The Court erred in holding, deciding and adjudging that the petitioner, Erich Paul Hans Hempel, be discharged from the custody of Luther Weedin, as United States Commissioner of Immigration at Seattle, Washington, District No. 28.

III.

The Court erred in deciding, holding and adjudging that the petitioner, Erich Paul Hans Hempel, was not subject to deportation, but was entitled to remain in the United States.

THOS. P. REVELLE.
THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE.
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Appellant.

Service admitted this 19th day of March, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Mar. 19, 1928. [30]

[Title of Court and Cause.]

STIPULATION RE TESTIMONY TAKEN AT COURT HEARING.

It is hereby stipulated by and between the parties hereto by their respective counsel, that for all purposes of the appeal in the above-entitled matter to the United States Circuit Court of Appeals, for the Ninth Circuit, and for any further appeal of said cause, that the record on appeal may show that at the hearing had before the Honorable Edward E. Cushman, United States District Judge, Western District of Washington, on the 19th day of December, 1927, the proof offered on behalf of the petitioner, Erich Paul Hans Hempel, purported to show that said Erich Paul Hans Hempel had been granted a full pardon under the laws of Germany for the crime of embezzlement, and that prior to his entry into the United States he had by reason of said pardon been restored to all his civil rights under the laws of Germany, and that at the time the said Erich Paul Hans Hempel was so restored to all his civil rights under the laws of Germany, the Governments of the United States of America and of Germany were at peace, and that no evidence to the contrary was offered on behalf of the respondent.

Dated this 10th day of March, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.
THOS. P. REVELLE,
Attorney for Respondent.
ANTHONY SAVAGE.

[Endorsed]: Filed Apr. 4, 1928. [31]

[Title of Court and Cause.]

STIPULATION FOR TRANSMISSION OF ORIGINAL RECORD.

It is hereby stipulated by and between counsel for petitioner and for the Commissioner of Immigration, that the certified immigration file and records of the Department of Labor covering the deportation proceedings against the petitioner, which were filed with the return of the Commissioner of Immigration to the order to show cause, may be transmitted with the appellate record in this case, and may be considered by the Circuit Court of Appeals in lieu of a certified copy of said immigration files and records of the Department of Labor.

PATTERSON & ROSS,
Attorneys for Petitioner.
THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Appellant.

Received a copy of the within stipulation this 23 day of April, 1928.

———————,

Attorneys for Petitioner.

[Endorsed]: Filed Apr. 25, 1928. [32]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by this Court ORDERED, and the Court does hereby order, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, which was filed with the return of the Commissioner of Immigration to the order to show cause, directly to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record, it being promised by respondent's attorney, Asst. U. S. Atty. Coles, that such records will be returned to the office of the Clerk of this court when the case is concluded.

Done in open court this 23d day of April, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within order this 23 day of April, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Apr. 24, 1928. [33]

[Title of Court and Cause.]

PRAECIPE FOR APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled cause for appeal of the said respondent to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Return to order to show cause.
4. Order granting writ of habeas corpus and discharging petitioner, dated January 24, 1928.
5. Order fixing bond of petitioner, dated January 26, 1928.
6. Notice of appeal.
7. Assignment of errors.
8. Stipulation for transmission of original record.
9. Order for transmission of original record.
10. This praecipe.
11. Stipulation respecting testimony taken at court hearing.

12. Memorandum decision.

THOS. P. REVELLE,
United States Attorney,
ANTHONY SAVAGE,
Assistant United States Attorney,
Attorneys for Appellant.

Received a copy of the within praecipe for appellant this 23 day of April, 1928.

PATTERSON & ROSS,
Attorneys for Petitioner.

[Endorsed]: Filed Apr. 24, 1928. [34]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 34, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of

Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Act of Feb. 11, 1925) for making record certificate or return, 113 folios at 15¢.	$16.95
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to original exhibits, with seal	.50
	$17.95

[35]

I hereby certify that the above cost for preparing and certifying record, amounting to $17.95, will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending June, 30, 1928.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 28th day of April, 1928.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. E. Leitch,

Deputy. [36]

[Endorsed]: No. 5480. United States Circuit Court of Appeals for the Ninth Circuit. Luther Weedin, United States Commissioner of Immigration, District No. 28, Appellant, vs. Erich Paul Hans Hempel, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 2, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.